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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

Nos. 72, 87, 290 and 291

No. 72.

J. D. SHELLY, *et al.*, *Petitioners,*

vs.

LOUIS KRAEMER, *et al.*, *Respondents.*

No. 87.

ORSEL McGHEE, *et al.*, *Petitioners,*

vs.

BENJAMIN J. SIPES, *et al.*, *Respondents.*

No. 290.

JAMES M. HURD, *et al.*, *Petitioners,*

vs.

FREDERIC E. HODGE, *et al.*, *Respondents.*

No. 291.

RAPHAEL G. URCIOLO, *et al.*, *Petitioners,*

vs.

FREDERIC E. HODGE, *et al.*, *Respondents.*

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN, THE SUPREME COURT OF THE STATE OF MISSOURI, AND THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

Brief of the American Indian Citizens League of California, Inc., as Amicus Curiae.

AMERICAN INDIAN CITIZENS LEAGUE OF CALIFORNIA, INC.,
Amicus Curiae.

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The undersigned, as counsel for and on behalf of the American Indian Citizens League of California, Inc., respectfully moves this Honorable Court for leave to file the accompanying brief as *Amicus Curiae*.

The American Indian Citizens League of California, Inc., is a non-profit organization which has dedicated itself to the protection and promotion of the general welfare and civil rights of citizens of American Indian descent, as well as all others.

The question is essentially whether racial restrictive covenants are illegal and whether their enforcement is constitutional.

It is to present written argument on this issue that movants seek leave to file a brief *Amicus Curiae*.

Counsel for the petitioners and for the respondents have consented to the filing of this brief, in every case, except that counsel for the respondents in No. 87, *McGhee v. Sipes*, has not answered our request for permission, probably through inadvertence since we understand that all counsel in all the within cases have agreed to permit *amicus* briefs.

November 18, 1947.

WILLIAM STRONG,

Counsel for American Indian Citizens League of California, Inc.

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ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN, THE SUPREME COURT OF THE STATE OF MISSOURI, AND THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

Brief of the American Indian Citizens League of California, Inc., as Amicus Curiae.

Preliminary Statement.

The American Indian Citizens League of California is a nonprofit membership corporation organized under the laws of California for the purpose of opposing every type of discrimination against Indians and others predicated upon considerations of race, national origin, and creed.

The American Indians and their descendants, have not only suffered various indignities for years, but are now being denied, in many parts of the United States, as non-caucasians, a place to live upon the continent which was once entirely theirs, all as the result of land restrictions prohibiting occupancy of premises by Indians and their descendants.

This organization, representing Indians and descendants of Indians of various nations and tribes, ranging from full-bloods to persons having as little as one-sixty fourth Indian blood, is concerned, however, not only with the plight of Indians in this respect, but also that of other restricted groups, and is concerned also with the grave danger to our democratic system implicit in the extension and perpetuation of racist doctrines of the type exemplified by the race restrictive covenant.

For it is, we submit, a matter of national concern when restrictions against land occupancy by American Indians, Mexicans, Armenians, Chinese, Negroes, Japanese, Jews and others are permitted to exist and become more extensive. It is clearly but a matter of time until Catholics, Protestants and persons of other religious, national origins and races are similarly barred from use and occupancy of real estate.

We think the time has come for the people of the United States through this Court to reaffirm unequivocally the

perpetual guarantees of life, liberty and the pursuit of happiness, and to reassert fundamental human rights by striking down the unAmerican system of racial restrictions.

For these reasons, the American Indian Citizens League of California, Inc., representing American citizens of Indian descent, files this brief on behalf of the petitioners in these cases.

Discussion.

General.

This Court has on numerous occasions expressed itself as being opposed to racial and religious discrimination. As stated in *Hirabayashi v. United States,* 320 U. S. 81, at p. 100, this Court recognizes that "distinctions between citizens solely because of their ancestry, are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." Similar sentiments have been expressed by this Court also in *Korematsu v. United States,* 323 U. S. 214, 223; *Skinner v. Oklahoma,* 316 U. S. 535, 541, and other cases.

And it is plain, as this Court pointed out in *Minersville District v. Gobitis,* 310 U. S. 586, 595-596, that "national unity is the basis of national security."

That discrimination on racial or religious lines is morally indefensible, obviously requires no argument. There is likewise no legal basis for such action, as we demonstrate more fully below.

In brief, it is our view that such racial and religious differences cannot be recognized in the law as a proper basis for restricting the alienation, use or occupancy of real property, because such restriction is contrary to the

basic laws of the United States, to national public policy, to specific treaty obligations of the United States, to the guarantees of the Constitution of the United States, especially those contained in the Fifth and Fourteenth Amendment.

I.

Restrictive Covenants Violate Our Treaty Obligations and Fundamental Laws.

It is part of the fundamental law of the land that "* * * All treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges, in every State, shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.". (Art. IV, Constitution (1 Stat. 19); *United States v. The Schooner Peggy,* 1 Cranch. 103; *Ware v. Hylton,* 3 Dall. 199.) A treaty is determinative of the rights of all parties affected by it, and is to be carried into execution by the sovereign power of the contracting parties. (*Foster et al. v. Neilson,* 2 Peters 253, 314; *United States v. Arredondo,* 6 Peters 735.)

Numerous treaties have been signed by the United States guaranteeing fundamental rights to inhabitants of this country. These guarantees both in effect and directly extended the utmost protection in these respects, placing all persons affected on an equal footing.

Thus under the Charter of the United Nations (59 Stat. 1031) the United States recently agreed to promote freedom for all without distinction as to race, national origin or religion, when it subscribed to Article 55c of the Charter, which provides that "The United Nations

shall promote . . . uniform respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, and religion," and to Article 56, which provides that all members pledge themselves to take joint and separate action for the achievement of the purposes set forth in Article 55. That charter is binding upon this Court and all persons in the United States.

Then, the United States Government signed the Act of Chapultepec, in Mexico City, on March 6, 1945, undertaking in part to ". . . prevent with all the means within their power all that may provoke discrimination among individuals because of racial and religious reasons."

This Act, expressly providing that this country would prevent with all the means in its power all discrimination, is, we submit, a direct mandate to this Court to take all necessary steps in that direction.

There are other treaties which protect basic rights.

The treaty of cession of the Territory of Louisiana provides, in Article III, that "The inhabitants of the ceded territory shall be incorporated into the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess." (8 Stat. 200, 202.)

Then, in the treaty of cession of the Floridas (February 22, 1819 and October 29, 1820, 8 Stat. 252, 258), between the United States and Spain, it was provided that the inhabitants of that territory, including the Florida In-

dians, were to be "admitted to the enjoyment of all the privileges, rights, and immunities of the citizens of the United States." And under the Treaty of Guadalupe Hidalgo, February 2, 1848 (9 Stat. 922), the United States agreed to maintain the inhabitants of California, who were mostly aboriginal Indians, in the free enjoyment of their liberty and property.

In 1789, the Congress by statute in effect (Act of August 7, 1789, 1 Stat. 50) reenacted the Northwest Ordinance of 1787, which provided in part that "* * *. The utmost good faith shall always be observed towards the Indians; * * * and in their property, rights, and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them * * *."

Under the treaties of cession the United States obtained territory in perpetuity; and the promises and protection extended to the inhabitants of those territories were also in perpetuity. Today those guarantees are as effective as they were when first made.

Nothing in the guarantees creates different classes of citizenship or unequal rights. All the rights, privileges and immunities of the citizens of the United States, whether expressly set forth in the Constitution of the United States or impliedly present, are to be had by all the inhabitants, and their descendants obviously, of the ceded territories. And those territories cover the greater part of the United States. Every right, privilege and immunity of *citizens of the United States,* wherever enumerated, and from every source, exists today, and is in effect an equitable servitude upon the territory embraced

by the treaties. These servitudes antedate any which may have been brought into existence by subsequent deed restrictions.

Moreover, since all of the enumerated treaties are the law of the land, no contract or undertaking of any kind contrary to their provisions may receive enforcement in any court in the United States.

A treaty has the same overriding effect as an act of the legislature, in cases before the courts of justice, said Chief Justice Marshall in 1829 in *Foster and Elan v. Neilson*, 2 Pet. 253, 314:

> "Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature."

And as Chief Justice Taney in *Kennett v. Chambers*, 14 How. 38, speaking for the Court, stated unequivocally:

> "* * * treaties, while they remained in force, were, by the Constitution of the United States, the supreme law, and binding not only upon the government, but upon every citizen. No contract could lawfully be made in violation of their provisions * * *. For as the sovereignty resides in the people, every citizen is a portion of it, and is himself personally bound by the laws which the representatives of the sovereignty may pass, or the treaties into which they may enter, within the scope of their delegated authority. * * * It is his own personal compact as a portion of the sovereignty in whose behalf it is made. * * * our own freedom cannot be preserved without obedience to our own laws, nor social order preserved if the judicial branch of the government

countenanced and sustained contracts made in violation of the duties which the law imposes, or in contravention of the known and established policy of the political department, acting within the limits of its constitutional power." (Pp. 46, 49-50.)

This case was one of the principal reasons for the decision in *Gandolfo v. Hartman*, 49 Fed. 181 (So. Calif., 1892), denying enforcement of a restriction against Chinese. Enforcement, the court said, would violate the most favored nation clause of a treaty between the United States and China, whereby the United States promised that the Chinese residing here would be treated with the same respect accorded to other people.

"It would be a very narrow construction of the Constitutional amendment in question and of the decisions based upon it, and a very restricted application of the broad principles upon which both the amendment and the decisions proceed, to hold that, while State and municipal legislatures are forbidden to discriminate against the Chinese in their legislation, a citizen of the State may lawfully do so by contract, which the Courts may enforce. Such a view is, I think, entirely inadmissible. Any result inhibited by the Constitution can no more be accomplished by contract of individual citizens than by legislation, and the court should no more enforce the one than the other . . . . But the principle governing the case, is in my opinion, equally applicable here, where it is sought to enforce an agreement made contrary to the public policy of the government, in contravention of one of its treaties, and in violation of a principle embodied in its Constitution. Such a contract is absolutely void, and should not be enforced in any court—certainly not in a court of equity of the United States."

Also, see: *United States v. Pink*, 315 U. S. 203; *Missouri v. Holland*, 252 U. S. 416; *United States v. Belmont*, 301 U. S. 324.

Not only have such promises of fundamental rights been made in treaties with foreign nations, but also with domestic nations, the Indians.

Treaties with the Indian tribes are also paramount law. *Lone Wolf v. Hitchcock*, 187 U. S. 553, 565-566 (1903); *Thomas v. Gay*, 169 U. S. 264, 270; *Cherokee Tobacco*, 11 Wall. 616 (1870); *Ward v. Race Horse*, 163 U. S. 504 (1896); *United States v. Forty-three Gallons of Whiskey*, 93 U. S. 188 (1876); *Geofroy v. Riggs*, 133 U. S. 258, 266 (1890).

And present titles and restriction rights as to all land bottomed on Indian aboriginal titles, are subject to treaty provisions with the Indians.[1]

Neither Congress, nor a state or a private individual can, of course, affect titles or conditions granted by treaty, or rights thereunder.[2] *Jones v. Meehan*, 175 U. S. 1 (1899).

The United States has always had a special duty of protecting the Indians because of the peculiar relationship arising under the treaties made with them, and their presence as sovereign powers in our midst. *United States v. Kagama*, 118 U. S. 375, 384.

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[1]By the Act of March 3, 1799, Congress expressly provided that the sole method of acquiring land from Indians was to be by treaty or convention under the Constitution (Act of Mar. 3, 1799, Sec. 12, 1 Stat. 746).

[2]In the Act of March 3, 1871, Rev. Stat., Sec. 2079, ending future treaty making with Indian tribes and nations, Congress in part stated that: "* * * no obligation of any treaty lawfully made and ratified with any such Indian Nation or Tribe prior to March 3, 1871, shall be hereby invalidated or impaired."

See, also, *e. g., Cherokee Nation v. Georgia,* 5 Pet. 1; *Worcester v. Georgia,* 6 Pet. 536.

Almost since its inception also, the United States has had before it the problem of providing land for American Indians who had been displaced, and protecting their occupancy and use of lands.[3]

That problem arose, it appears, primarily from the acts of settlers on the North American Continent of often forcibly dispossessing the native landholders with aboriginal titles,[4] and because of cessions by treaty of vast tracts, with unsatisfactory reservations of land by the Indians.

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[3] *Johnson v. McIntosh,* 8 Wheat. 543; *Mitchell v. United States,* 9 Pet. 711, 745; *United States v. Cook,* 19 Wall. 591; *Leavenworth v. United States,* 92 U. S. 733, 742; *Seneca Nation v. Christy,* 162 U. S. 283, 288-289; *Beecher v. Wetherby,* 95 U. S. 517, 525; *Minnesota v. Hitchcock,* 185 U. S. 373, 388 *ff.*; *Lone Wolf v. Hitchcock,* 187 U. S. 553; *Jones v. Meehan,* 175 U. S. 1; *Spalding v. Chandler,* 160 U. S. 394; *M'Fadden v. Mountain View Min. & Mill Co.,* 97 Fed. 670, 673 (C. C. A. 9), rev'd on other grounds, 180 U. S. 533; *Gibson v. Anderson,* 131 Fed. 39 (C. C. A. 9).

[4] See, *e. g., Holden v. Joy,* 17 Wall. 211 (1872), in which this Court said: "Beyond doubt the Cherokees were the owners and occupants of the territory where they resided before the approach of civilized man to the western continent, deriving their title, as they claimed, from the Great Spirit, to whom the whole earth belongs, and they were unquestionably the sole and exclusive masters of the territory . . . the lands . . . were held by the Cherokees under their original title, acquired by immemorial possession, commencing ages before the New World was known to civilized man". (pp. 243-244). See, also, *Mitchell v. United States,* 9 Pet. (11 Curtis) 711 (1835), where this Court stated it to be a "settled principle" that the American Indians' "right of occupancy is considered as sacred as the fee-simple of whites." Also, *Johnson v. McIntosh,* 8 Wheat. 574; *Marsh v. Brooks,* 8 How. 223, 232-233 (1850); *Lone Wolf v. Hitchcock,* 187 U. S. 553; *Blacksmith v. Fellows,* 7 N. Y. 401, 411 (1852); *United States v. Shoshone Tribe,* 304 U. S. 111, 117 (1938). The California Indians' aboriginal occupancy titles to land were recognized also by Mexican law. See, *e. g., Hoyt v. United States,* 38 C. Cls 455 (1903) and *Chouteau v. Molony,* 16 How. 203 (1853).

For the Indians through various treaties had placed themselves as nations, tribes, and individuals under the general and overall protection of the United States, and the United States Government accepted that responsibility.

Included in the numerous treaties under which the Indians gave up valuable lands and rights, were various clauses under which the Indians were placed under special protection of the United States. Typical of provisions of this type is that found in the Treaty of 1785 with the Cherokees (7 Stat. 18), in which it was stipulated that the Indians were to "be under the protection of the United States of America * * *." (Art. III, 7 Stat. 19.)[5]

Substantially similar provisions were placed in treaties with other Indian nations and tribes.[6]

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[5]In that treaty it was further stipulated that "The hatchet shall be forever buried, and the peace given by the United States, and the friendship re-established between the said states on the one part, and all the Cherokees on the other, shall be universal; and the contracting parties shall use their utmost endeavours to maintain the peace given as aforesaid, and friendship re-established." (Art. XIII 7 Stat. 20.)

[6]See treaties with the Choctaws (1786, 7 Stat. 21, Arts. II, XI); Chickasaws (1786, 7 Stat. 24, Arts. II, XI); Shawanoes (1786, 7 Stat. 26, Art. V); Wyandots, Delawares, Ottowas, Chippewas, Pattawatimas and Sacs (1789, 7 Stat. 28, Art. XIV); Mohawks, Oneidas, Onondagas, Tuscaroras, Cayugas and Senecas (1789, 7 Stat. 33, Art. IV); Creeks (1790, 7 Stat. 35, Arts. II, XIII); Cherokees (1791, 7 Stat. 39, Art. II); Delawares, Shawanoes, Putawatimas, Miamies, Eel Rivers, Kickapoos, Piankashaws and Kaskaskias (1803, 7 Stat. 74, Art. 3d); Kaskaskias (1803, Art. 2d, 7 Stat. 78); Sac and Fox tribes (1804, Arts. 1, 10, 78, Stat. 84); Wyandots, Ottawas, Chippewas, Munsees, Delawares, Shawnees, and Putawatimas (1805), Art. 1, 7 Stat. 87); Piankishaws (1805, Art. II, 7 Stat. 100); Osages (1808, Art. 10, 7 Stat. 107); Teetons (1815, Art. 3, 7 Stat. 125); Siouxs (1815, Art. 3, 7 Stat. 126; Art. 3, 7 Stat. 127; 1816, Art. 4, 7 Stat. 143); Yanctons (1815, Art. 3, 7 Stat. 128); Mahas (1815, Art. 3, 7 Stat. 129); Kanzas (1815, Art. 3, 7 Stat. 137); Winnebagos (1816, Art. 3, 7 Stat.

The Poncars were guaranteed not only protection by the United States, but also "such benefits and acts of kindness as may be convenient, and seem just and proper to the President of the United States" (Treaty of June 9, 1825, Art. 2 (7 Stat. 248).) Similar guarantees also were made to other Indians.[7]

In many of the treaties the United States guaranteed to the Indians complete protection against any person. For instance, in the treaty with the Kaskaskias (August 13, 1803, 7 Stat. 78) it was provided that "The United States will take the Kaskaskia tribe under their immediate care and patronage, and will afford them a protection as effectual against * * * all other persons whatever as

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145); Ottoes (1817, Art. 3, 7 Stat. 154); Poncarars (1817, Art. 3, 7 Stat. 155); Grand Pawnees (June 18, 1818, Art. 3, 7 Stat. 172); Pitavirate Noisy Pawnees (June 19, 1818, Art. 3, 7 Stat. 173); Pawnees (June 20, 1818, Art. 3, 7 Stat. 174); Pawnee Marhars (June 22, 1818, Art. 3, 7 Stat. 175); Quapaws (Aug. 24, 1818, Art. 1, 7 Stat. 176); Florida tribes (Sept. 18, 1823, Art. I, 7 Stat. 224); Ioways (Aug. 4, 1824, Art. 4th, 7 Stat. 231).

[7]Including the Teton, Yancton and Yanctonies bands (Treaty of June 22, 1825, Art. 2 (7 Stat. 250); the Sioune and Ogallala bands (Treaty of July 5, 1825, Art. 2 (7 Stat. 253)); the Chaynne tribe (Treaty of July 6, 1825, Art. 2 (7 Stat. 255)); the Hunkpapos band (Treaty of July 16, 1825, Art. 3 (7 Stat. 257)); the Ricara tribe (Treaty of July 18, 1825, Art. 3 (7 Stat. 259)); the Minnetaree tribe (Treaty of July 30, 1825, Art. 3 (7 Stat. 262)); the Mandan tribe (Treaty of July 30, 1825, Art. 3 (7 Stat. 264)); the Crow tribe (Treaty of Aug. 4, 1825, Art. 2 (7 Stat. 266)); the Ottoe and Missouri tribes (Treaty of Sept. 26, 1825, Art. 2 (7 Stat. 277-278)); the Pawnee tribe (Treaty of Sept. 30, 1825, Art. 2 (7 Stat. 280)); the Maha tribe (Treaty of October 6, 1825, Art. 2 (7 Stat. 282)), as well as others.

is enjoyed by their own citizens."[8] In return, the Kaskaskia tribe agreed to refrain from making war without the consent of the United States.[9]

In 1816, the United States and the Ottawas, Chippewas and Pottowotomeies[9a] agreed that "in all things whatever, they will act with justice and correctness toward each other * * *" (Treaty of August 24, 1816, Art. 3, 7 Stat. 147). Contrary to the terms of such treaties, title holders and others now seek to impose conditions upon the alienation, use and occupancy of land. This result clearly should not be countenanced.

Fundamental rights safeguarded to individuals in this country by these treaties with the Indian nations and tribes and with foreign nations, are violated when restrictions, contrary to treaty terms, are placed by private persons, and enforced by the judiciary, upon the alienation,

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[8]Similar protection by the United States was accorded in other treaties, including the Treaty of September 25, 1818, Art. 3 (7 Stat. 182); the Treaty of Aug. 7, 1790, Art. 2 (7 Stat. 35); Treaty of Nov. 17, 1807, Art. 7 (7 Stat. 105); Treaty of December 30, 1849, Arts. 1 and 4 (9 Stat. 984); Treaty of Sept. 26, 1825 (7 Stat. 277); Treaty of Oct. 28, 1867 (15 Stat. 593); Treaty of Apr. 29, 1868 (15 Stat. 635); Treaty of July 30, 1819 (7 Stat. 200); Treaty of September 18, 1823 (7 Stat. 224); Treaty of September 27, 1830 (7 Stat. 334), and others.

[9]And all ambiguities in treaties with the Indians are, of course, to be resolved in favor of the Indians. *Winters v. United States*, 207 U. S. 564; *Fleming v. McCurtain*, 214 U. S. 56, 60; *Worcester v. Georgia*, 6 Pet. 515, 551-553, 582 (1832).

[9a]The spelling of names varies in the treaties.

use and occupancy of real property solely on the basis of race, national origin, or religion. These treaties directly protect all citizens of the United States, and in many instances, inhabitants of the territory they embrace. Those with the Indians accord special protection and consideration to them, in addition to the rights which are theirs by virtue of all other statutory and treaty terms. Equality of treatment and protection for all citizens in their constitutional rights is implicit in all of these obligations assumed by this government.

Certainly the abhorrent treatment of the American Indian and his descendants by so-called "Caucasians" with respect to residential restrictions, can no longer be justified on the ground that the Caucasian is a conqueror and the Indian is the vanquished. Mere overwhelming by force of numbers and weight of arms certainly cannot be considered proof either of continuing racial superiority or ethical or cultural primacy. The American Indian is now a full-fledged citizen of the United States. Not an inhabitant of this Continent either by peaceful immigration or by force and violence, the aboriginal owner of this Continent should not be relegated to second-class citizenship, a landless status by the later arrivals, by force of law.

Manifestly, we submit, all persons of Indian descent are entitled even now to federal protection from discrimination, at least in the use or occupancy of land, because of their national origin; discrimination which could not possibly have come into existence had the land of the Indians remained under their control.

And as stated by this Court in *Scott v. Sanford,* 19 How. 393 (1857), "* * * if an individual [Indian] should leave his nation or tribe and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people" (p. 404). The Indian in such a case would acquire further rights, in addition to those which are his by the force of Indian treaties. In fact, we think that the individual Indian would have all the added rights of citizens of the United States and of persons from the most favored nation under treaties with the United States.

However, the citizens of American Indian descent desire equality of treatment for all people in the United States, not merely for themselves.

II.

Court Enforcement of Racial Restrictions Is Unconstitutional State Action.

We concur in the view that enforcement of race restrictive covenants by the state courts constitutes state action violative of the Fourteenth Amendment to the Constitution.[10] See McGovney's Article in the March 1945 issue of California Law Review, Vol. 33, No. 1. We do not intend, however, to engage in long discussion of that point, since we feel certain that it will be discussed extensively by the parties before this Court and by other *amicus curiae*.

It is settled, of course, that action by any division or branch of the state, including the judicial branch, is state action within the meaning of the Fourteenth Amendment. *Ex parte Virginia*, 100 U. S. 339; *Virginia v. Rives*, 100 U. S. 313; *Mooney v. Holohan*, 294 U. S. 103; *Twining v. New Jersey*, 211 U. S. 78. And it likewise settled that state action is not permitted where it contravenes the prohibitions of the Constitution. Direct discrimination on racial or religious grounds by a state or any of its instrumentalities is, of course, illegal. *Buchanan v. Warley*, 245 U. S. 60; *Harmon v. Tyler*, 273 U. S. 668; *Deans v. City of Richmond*, 281 U. S. 704.[11]

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[10]The same issue is presented not only with reference to the enforcement action of the state courts, but also as to the acts of any of the state functionaries whose official action may be necessary at any point from the inception of the restriction to its ultimate effectuation by eviction of the user or occupant.

[11]Also see *Irvine v. City of Clifton Forge*, 124 Va. 781, 97 S. E. 310; *Glover v. City of Atlanta*, 148 Ga. 285, 96 St. 562; *Jackson v. State*, 132 Md. 311, 103 Atl. 910; *Bowen v. City of Atlanta*, 159 Ga. 145, 125 S. E. 199; *Clinard v. City of Winston-Salem*, 217 N. C. 119, 6 S. E. (2d) 867; *Allen v. Oklahoma City*, 175 Okla. 421, 52 P. (2d) 1054.

A state must act in a manner consistent with the Fourteenth Amendment, that is, "consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Hebert v. Louisiana*, 272 U. S. 312, 316. And it has often been held that any attempt to accomplish indirectly that which cannot be done directly, will not be tolerated.[12]

There is no reason to permit the state to be used to effectuate a discrimination prohibited to it, simply because it was initiated by private parties unconnected with the state; in fact, we submit that the utilization of any state power to that end makes the private action, direct state action.

A private contract, like a state law, is ineffective unless and until enforced by the courts, the "ultimate voice of state law."[12a] Whether mandatory or prohibitory in its terms, it is not self-executing as a measure of compulsion upon those who disregarded its provisions. Only when the "judicial power of the state has been exerted" (*Iowa-Des Moines National Bank v. Bennett*, 284 U. S. 245-247) will the requirements of a statute otherwise disregarded, receive compliance. Similarly ineffective are the terms of a private agreement or the restrictive terms of a deed, until and unless an enforcing court acts to vitalize them by decreeing compliance. Enforcement by the state courts of so-called private restrictive covenants

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[12]Compare, *Harmon v. Tyler*, 273 U. S. 668, in which the ordinance barred whites or negroes from any "community or portion of the city * * * except on the written consent of a majority of the persons of the opposite race" inhabiting it. (*Tyler v. Harmon*, 158 La. 439, 104 So. 200.)

[12a]*Snowden v. Hughes*, 321 U. S. 1, 17.

gives those covenants the force of law as effectively as though enacted by the legislature.[13]

In doing so, the state court becomes a direct participant in the restriction, a partner in the entire transaction, and a principal in the commission of the deed. Manifestly the state may not appear in such a role.[14]

There is no practical difference, we submit, between direct discrimination by the state and the use of its powers to put into effect a private undertaking whose provisions are beyond the power of the state to accomplish directly.[15]

Also, the notion that a state court is to be permitted to enforce a racial restrictive covenant merely because it is the act of private individuals, disregards the long history of refusals by courts to enforce private agreements which are illegal, which are contrary to the terms of a treaty,

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[13]See, *e.g. Chicago, B. & Q. R. R. Co. v. Chicago,* 166 U. S. 226; *Powell v. Alabama,* 287 U. S. 45; *Scott v. McNeal,* 154 U. S. 34; *Twining v. New Jersey,* 211 U. S. 78; *Cantwell v. Connecticuit,* 310 U. S. 296; *Moore v. Dempsey,* 261 U. S. 86; *American Federation of Labor v. Swing,* 312 U. S. 321; *Virginia v. Rives,* 100 U. S. 313; *Bridges v. California,* 314 U. S. 252. *Cf. Corrigan v. Buckley,* 299 Fed. 899, app. dism. 271 U. S. 323: "The individual citizen * * * may refuse to sell or lease his property to any particular individual or class of individuals. The state alone possesses *the power to compel a sale or taking of private property* * * * " (p. 901.) (Italics ours.)

[14]*Cf. Smith v. Allwright,* 321 U. S. 649; *Civil Rights Cases,* 109 U. S. , at p. 17; *Gandolfo v. Hartman,* 49 Fed. 181, 192, 193.

[15]It is clear, of course, that we are not concerned here merely with the actions of private individuals unaided by the power of the state.

contrary to Constitutional guarantees, to law, to equity concepts and to public policy. (See, also, Section IV. *infra.*)

Because state court enforcement of a racial restrictive covenant violates the Fourteenth Amendment, such state action should be declared unconstitutional by this Court.

Much will be said in this case also, we know, by others concerning *Corrigan v. Buckley*, 299 Fed. 899, and the cases following it.[16]

We merely state, therefore, our position that the holding of that case is not determinative of the issues or concepts here presented. And even if it were so determinative, we believe that the evil brought about by the extensive spread of racial restrictive covenants during the past 20 years would be sufficient reason for a reexamination of that problem by this Court at this time. For we firmly believe that no decision adversely affecting the lives and well-being of millions of our people should be permitted by this Court to stand merely because it constitutes a prior judicial pronouncement.

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[16]*E.g., Thornhill v. Herd* (Mo. App.), 130 S. W. (2d) 558; *United Cooperative Realty v. Hawkins*, 269 Ky. 563, 108 S. W. (2d) 507; *Lyons v. Wallen*, 191 Okla. 567, 133 P. (2d) 555; *Meade v. Dennistone*, 173 Md. 295, 196 Atl. 330; *Ridgway v. Coburn*, 163 Misc. 511, 514, 296 N. Y. Supp. 936; *Doherty v. Rice*, 240 Wis. 389, 3 N. W. (2d) 734.

III.

Racial Classifications Cannot Meet the Due Process and Equal Protection Requirements of the Fourteenth Amendment.

Although enforcement of race restrictive covenants must necessarily be predicated upon the application by the courts of definite standards to determine the race or national origin of the all parties to the suit, plaintiff, as well as defendant, it is actually impossible to classify persons as to race or national origin with a degree of accuracy sufficient to establish a test which, when applied by the court would not create a denial of due process or a violation of the equal protection clause of the Fourteenth Amendment or the former of the Fifth Amendment.

The Fourteenth Amendment clearly intende that "not only there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights, and that all persons should be equally entitled to pursue their happiness and acquire and enjoy property, * * * that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others * * *." *Barbier v. Connolly*, 113 U. S. 27, 31-32.

Then, also, in *Strauder v. West Virginia*, 100 U. S. 303, this Court long said that:

> "The Fourteenth Amendment makes no attempt to enumerate the rights it is designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory;

> but every prohibition implies the existence of rights and immunities prominent among which is an immunity from inequality of legal protection, either for life, liberty or property." (100 U. S. at p. 310.)

And the right of a citizen under the Fourteenth Amendment "to live * * * where he will," has been long recognized. See, *e. g., Allgeyer v. Louisiana,* 165 U. S. 578, 589.

In the absence of an objective and reasonably accurate test and of equal application of racial terms in restrictive covenants cases, inequality of treatment necessarily results in every case. Where a denial of basic rights is sought in a court of equity in a suit to enforce a race restrictive covenant, not only the race of the defendant, but also that of the plaintiff is in issue; for the latter, to obtain relief, we submit, should plainly be required to establish first that he does not fall within the restricted class. That the plaintiff could not, in our opinion, ever show.

While the absence of a precise mathematical or scientific basis for classification is not required (*Lindsley v. Natural Carbonic Gas Co.,* 220 U. S. 61), it cannot be wholly arbitrary, unreasonable or unfounded in fact. See, *e. g. Williams v. Walsh,* 222 U. S. 415; *Finley v. California,* 222 U. S. 28; *Watson v. Maryland,* 218 U. S. 173; *Bachtel v. Wilson,* 204 U. S. 36. There can be no uniformity of application, however, when the test is not susceptible to any degree of accuracy of definition. Plainly there can be no equality of application of the term "Caucasion" or "non-Caucasian" or any other racial terms when no scientific or factual basis can be established for such classification. Since the class is unidentifiable, there

cannot even be equality of application to any person on the basis of inclusion in or exclusion from the class..

Ethnologically, there are asserted to be numerous so-called racial distinctions for purposes of classification, from a scientific standpoint. But at best, we submit, it can only be said that certain characteristics recur more frequently in people or the descendants of people of some definite geographic area, while other characteristics of those same people may recur with equal or even greater frequency in people of different geographic origins or their descendants.

The restrictions of occupancy to "Caucasions", "nordics", "persons of north European descent", and similar terms, and exclusions of those not able to establish their inclusion within such categories, are meaningless and unenforceable, and cannot serve as a basis for legislative or judicial action.

As stated by Huxley and Haddon,[17]

> "In a scientific age, prejudice and passion seek to clothe themselves in a garb of scientific respectability; and when they cannot find support from true science, they invent a pseudo science to justify themselves * * * nowhere is this lamentable state of affairs more pronounced than in regard to 'race.' A vast pseudo-science of 'racial biology' has been erected, which serves to justify political ambitions, economic ends, social grudges, class prejudices."[18]

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[17]Huxley and Haddon, "We Europeans, A Survey of Racial Problems," New York and London, 1936, p. VII.

[18]"It was and is an unessential defect in the heathen temper in men that they disbelieve in equality in the interest of the assertion of their superiority of status or privilege over other races. The ancient world was under this curse, and the spirit of race superiority in the modern world perpetuates it." R. E. Speer, "Race and Race Relations," New York, 1924, p. 66.

And as aptly put by Professor Finot,[18a]

> "Historical anthropology having already furnished us with negative lights, we remain stupefied before the amount of childishness and ignorance necessary for pretended savants in order to preach hatred between races amalgamated for centuries" (p. 279).[19]

Even a cursory examination of responsible authorities, discloses that no pure racial type exists in the world today.[20] And from an anthropological and ethnical standpoint, no one can claim to be a pure "Caucasian."

Professor Dixon, of Harvard, after long and extensive study, reached the conclusion that every people showed an intermixture with other peoples.[21] Franz Boos found it impossible for all practical purposes to assign any individual to a given race or ethnic group.[22]

[18a]Finot, "Race Prejudice," Suffolk, England; 1906.

[19]See also Frederich Hertz, "Race and Civilization," New York, 1928; F. H. Hankins, "The Racial Basis of Civilization," New York, 1931; J. M. Robertson, "The Illusion of Race," Contemporary Review, July, 1928; Cedrick Fowler, "Racial Prejudice, a Racket," New Outlook, October, 1934; L. L. Snyder, "Race, A History of Modern Ethnic Theories," New York, 1939.

[20]It is not intended to make an exhaustive review of all authorities in the fields of anthropology and ethnics. We believe that the impossibility of any court's establishing and utilizing any standards to determine the race of individual litigants upon the best facts available with sufficient accuracy to assure that there is no denial of due process or of equal protection of the laws, can be demonstrated even by the material used in this brief.

[21]Roland B. Dixon, "The Racial History of Man," New York, 1923. See also W. Z. Ripley, "The Races of Europe," New York, 1899.

[22]Boaz, "What is a Race?" Nation, 1925. See also Boaz, "The Question of Racial Purity," American Mercury, June, 1924.

Professor Hooton, of Harvard, states[23] that "race is essentially a zoological device" to classify groups "for the sake of convenience." He concluded that "* * * no pure race can be found in any civilized country," and that men "have intermingled and interbred for many thousands of years so that their genealogical lines have become inextricably confused." Professor Goldenwasser said that "the picture of race in history shifts from one of stability to one of recurrent changes."[24] He was also of the opinion that the "extraordinary variability" of so-called racial traits in the so-called "white race" points to an unusually varied ancestry.[25]

Snyder[26] concluded that "All methods of classification whether based upon craniological measurements, facial form, skin colour, stature, hair or eye or nose" are unsatisfactory, and that the "thesis of purity of present races is untenable, since the juxtaposition of peoples has resulted in an ethnic tangle." * * * "The work of racialists is based upon intuitive rationalization" and consequently is beset with "inconsistencies and falacies."[27]

It can be said the works of race scientists have been "compilations of naked prejudice," "false history and sham science" and that it is "impossible to find a definition (of race) which could be used in an exact sense."[27a] The Hit-

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[23]Hooton, "Apes, Men and Morons," New York (1937), pp. 152, 153.

[24]Goldenwasser, *Anthropology*, New York (1937), p. 19.

[25]Goldenwasser, *op. cit.*, p. 27.

[26]See Snyder, "Race, a History of Modern Ethnic Theories," N. Y. 1939.

[27]*Op. cit.*, pp. 29, 57.

[27a]Snyder, *op. cit.*, p. 3.

lerean concept of racial purity, is, of course, non-existent,[28] except in the minds of those seeking to impose restrictions on racial or religious grounds.

Professor Hooton also states that the so-called Nordic race, from which almost all Americans who class themselves as Caucasians spring, is probably "a hybrid derivative of several strains present in Europe during the glacial period, to which have been added in historic times Alpine, Mongoloid, and other racial elements."[29] "Europe," says Dr. Nicholas Murray Butler, "is a continent of 'energetic mongrels'."[30] An extensive investigation by Dr. Ales Hrdlicka into allegedly "pure stocks" of Americans,[31] disclosed that it was almost impossible to trace ascendants preceding great-grandparents.

The term "Caucasian" is defined[32] to include not only a "member of the white division or branch of the human species," but also Europeans, Indo-Europeans, members of the fair peoples of the Caucasus mountains.[33] There also appears to be a black "Caucasian"; he is a member of the "Eurafrican race" (*ibid,* p. 424). And other sources, including a government body,[34] numbers among "Cau-

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[28]See, *e.g.,* Huxley and Haddon, "We Europeans," N. Y. 1936, p. 123.

[29]Hooton, *op. cit,,* p. 153.

[30]Dr. Nicholas Murray Butler, *New York Times,* Dec. 20, 1935.

[31]Hrdlicka, *The Old Americans,* Baltimore, 1925.

[32]Funk & Wagnalls' New Standard Dictionary (1946), p. 424.

[33]The Caucasus mountains are a range 700 miles in length, between the Black and Caspian Seas, in Russia. (Funk & Wagnalls, p. 424).

[34]See "Dictionary of Races or Peoples," Report of the Immigration Commission, Senate Document No. 662, 61st Congress, Third Session.

casions" forty-one different peoples, among whom are Hindus of India, Arabians, Syrians, and others.

Although it is plain that racist theories are "despicably unscientific",[35] courts nevertheless have often determined the racial status of litigants by the simple process of looking at them. In fact, petitioner Hurd,[36] was held by the trial court to come within the restriction for the reason that the court concluded, by looking at him, that he was a Negro, despite Hurd's energetic insistence that he was a Mohawk Indian! [R. 238, 380, in No. 290.][37] On such a basis, Hurd lost his life savings invested in his home [R. 30 in No. 270]. And one of the plaintiffs below in another of the actions before this Court was found to be a Caucasian, although he never even appeared in court.[38]

In attempting, for example, to classify "the composite race which we call the American Indian,"[39] we are confronted with serious added difficulties rendering impossible the creation or application of any proper standard sufficient to escape the proscriptive provisions of the Fifth and Fourteenth Amendments.

No one can say with sufficient degree of accuracy where the Indians originated or what is, anthropologically, Indian stock. The classification by the courts of Indians as

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[35]G. B. Shaw, *New York Times*, July 10, 1938.

[36]Case No. 290.

[37]*Cf.* Herman Goering, who in 1933 decreed that applicants for the Prussian police force must not only be Aryans, but must look like Aryans. (*Milwaukee Leader*, August 23, 1933.)

[38]No. 291 [R. 380, 407].

[39]Hooton, *op. cit.*, p. 186.

"non-caucasians,"[40] we submit, has not a scientific basis sufficiently clear and certain to make that classification available for purpose of judicial application in restrictive covenant cases.[41]

Yet such classification is necessary in each case, of course, regardless of the precise language of the restriction.

The status of an individual as an Indian is predicated upon numerous factors, mostly arbitrary, some entirely unconnected with blood, race, or origin. And Indians are now being restricted in the use and occupancy of real estate under the overall term of "non-Caucasians" or as "Indians."

This Court on occasion has held that the natives of Pueblos were "Indians only in feature, complexion, and a few of their habits," but that because they were "a peaceable, industrious, intelligent, honest and virtuous people," they could not be classed as Indians. *United States v. Joseph*, 94 U. S. 614, 616. Subsequently, due to certain representations, this Court decided that these same persons

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[40]See, *e.g., Swift v. Rodgers*, Superior Court, Los Angeles County, No. 500,075 (1945). *Pearce v. Crocker*, No. 508,294, Superior Court, Los Angeles County, California.

[41]Former inhabitants of Mexico, the population of which is largely Indian, are considered to be "Caucasians." *Westminster School District, et al. v. Gonzalo Mendez, et al.* (C. C. A. 9), No. 11310, decided April 14, 1947. There the Court stated in part also:

> "Somewhat empirically, it used to be taught that mankind was made up of white, brown, yellow, black and red men. Such divisional designation has little or not adherents among anthropologists or ethnic scientists. A more scholarly nomenclature is Caucasid, Mongoloid and Negroid, yet this is unsatisfactory, as an attempt to collectively sort all mankind into distinct groups."

were in fact Indians, because they were a "simple, uninformed, and inferior people." *United States v. Sandoval*, 231 U. S. 28, 39-47. Then, this Court has held to be Indians persons so regarded by "common understanding." *Morrison v. California*, 291 U. S. 82, 86. In *United States v. Rogers*, 7 How. 567, the test prescribed was that the individual not only have some Indian blood but be recognized as an Indian before he could be placed in that category. In *United States v. Higgins*, 103 Fed. 348 (C. C. Mont.) the court relied upon the treatment by other departments of the Federal government as a criterion in classifying individuals as Indians. The court there stated that since half-breeds or mixed-blood Indians "as a rule, never found a welcome home with their white relatives," they should be classed as Indians. It pointed with apparent approval to an opinion of the Attorney General which stated that "Half-breed Indians are to be treated as Indians, in all respects *so long as they retain their tribal relations*" (103 Fed. 348, 352) (italics ours). Yet, in California at least, severance of tribal connections appears to be immaterial in restrictive covenant situations.

Children of a white father and an Indian mother have been held to be Indians,[42] and, also, not to be Indians.[43]

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[42] *Ex Parte Pero*, 99 F. (2d) 28 (C. C. A.); *Halbert v. United States*, 283 U. S. 753; *Farrell v. United States*, 110 Fed. 942 (C. C. A. 8); *Vegina v. United States*, 245 Fed. 411 (C. C. A. 8); *United States v. Higgins*, 103 Fed. 348 (C. C. Mont.); *Waldron v. United States*, 143 Fed. 413 (C. C. S. D.); *United States v. Sanders*, 27 Fed. Cas. No. 16220 (C. C. Ark., 1847). See also *Alberty v. United States*, 162 U. S. 499.

[43] *Ex Parte Reynolds*, 20 Fed. Cas. No. 11719 (D. C. W. D. Ark., 1879); *United States v. Higgins*, 110 Fed. 609 (C. C. Mont.); *United States v. Hadley*, 99 Fed. 437 (C. C. Wash.). See also *United States v. Ward*, 42 Fed. 320 (C. C. S. D.).

And, for various purposes, persons have been held by courts to be Indians when of mixed blood and living upon a reservation,[44] of half blood,[45] mixed bloods recognized by the tribe as members,[46] and even one-eighth bloods.[47]

The Act of June 25, 1938 (52 Stat. 1169) defines Indian to include Alaskan natives of one-half or more Indian blood[48] and various treaties recognize as Indians whites adopted by the tribe,[49] half bloods and quarter bloods,[50] white males married to Indian females,[51] and their children.[52]

A person can become classed as an Indian by adoption into a tribe, and the basis for adoption and for member-

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[44]*Famous Smith v. United States*, 151 U. S. 50.

[45]*In re Camille*, 6 Fed. 256 (C. C. Ore., 1880).

[46]*Sloan v. United States*, 118 Fed. 283; *United States v. Gardner*, 189 Fed. 690 (D. C. E. D. Wis.).

[47]*Scully v. United States*, 195 Fed. 113 (C. C. S. D.). Some other cases dealing with a facet of the shifting meaning of the term "Indian" include *Nagle v. United States*, 191 Fed. 141 (C. C. A. 9); *United States v. Kagama*, 118 U. S. 373, 383; *Hallowell v. United States*, 221 U. S. 317; *United States v. Celestine*, 215 U. S. 278; *United States v. Sutton*, 215 U. S. 291.

[48]Similar definitions are contained also in the Act of April 16, 1934 (48 Stat. 594, 596); the Act of February 6, 1909 (35 Stat. 600, 603) and the Act of June 18, 1934 (48 Stat. 984).

[49]*E.g.*, Treaty of September 29, 1817 (7 Stat. 163).

[50]*Ibid.*

[51]*E.g.*, Treaty of October 16, 1826 (7 Stat. 298); Treaty of September 28, 1836 (7 Stat. 521).

[52]*E.g.*, Treaty of October 16, 1826 (7 Stat. 298); Treaty of May 24, 1834 (7 Stat. 451).

ship in an Indian tribe, is a matter for its exclusive determination.[53]

Manifestly, a trial court would, to say the least, encounter considerable difficulty in establishing a test as to who comes within the category of "Indian" or "non-Caucasian" as those terms are used in restrictive covenant cases. For it is plain, we submit, that in attempting to classify persons to accomplish private restriction purposes as "Indians," "Caucasians," "non-Caucasians," "Armenians," etc., we are dealing with a race myth, "a concept pseudo-scientific in origin, grounded on hatred and hypocrisy and scorning the machinery of the intelligent mind."[54] And to determine at this late date in the history of mankind who is of pure "Caucasian" or other racial

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[53]See, *e.g., Delaware Indians v. Cherokee Nation,* 193 U. S. 127; *Nofire v. United States,* 164 U. S. 657; *Oakes v. United States,* 172 Fed. 305 (C. C. A. 8, 1909); *Pope v. United States,* 19 F. (2d) 219 (C. C. A. 9, 1927); *United States v. Rolfson,* 38 F. (2d) 806 (C. C. A. 9, 1930), rev'd 283 U. S. 753; *Jump v. Ellis,* 100 F. (2d) 130 (C. C. A. 10, 1938), cert. den. 306 U. S. 645; *Waldron v. United States,* 143 Fed. 413 (C. C. S. D., 1905); *Sully v. United States,* 195 Fed. 113, 125 (C. C. S. D., 1912); *Cherokee Intermarriage Cases,* 203 U. S. 76; *Smith v. Bonifer,* 154 Fed. 883, aff'd *sub. nom. Bonifer v. Smith,* 166 Fed. 846 (C. C. A. 9, 1909). See also Act of March 3, 1881, Sec. 4 (21 Stat. 414, 433); Act of March 2, 1889 (25 Stat. 1013); Act of February 13, 1891 (26 Stat. 749); Act of June 18, 1926 (44 Stat. 1609); Act of June 28, 1898, Sec. 21 (30 Stat. 495, 502); Act of April 4, 1910 (36 Stat. 269, 280); Act of March 31, 1921 (41 Stat. 1355); Act of May 19, 1924 (43 Stat. 132); Act of June 15, 1934 (48 Stat. 965). See also 25 U. S. Code, Sec. 163.

[54]Snyder, *op. cit.,* p. 312.

stock and whose blood is slightly tainted, is a wholly impossible task.

No "pure race can be found in any civilized country", says Hooton.[55] Any racial test applied by a court manifestly would be arbitrary and capricious, scientifically and ethnologically inaccurate and unreliable; and the application of any such test would constitute a denial of the due process and equal protection provisions of the Fourteenth Amendment and the due process clause of the Fifth Amendment.

[55]Hooton, *op cit.*, p. 153.

IV.

Race Restrictive Covenants Are Against National Public Policy.

There is a further reason why race restrictive agreements should not be enforced: such agreements are directly contrary to *national* public policy.

It is hornbook law, of course, that any private agreement or undertaking which is contrary to public policy to law, to treaties, and to the Constitution is void *ab initio* and will not be enforced. *Norman v. B. & O. R. R. Co.*, 294 U. S. 240; *Home Building and Loan Ass'n v. Blaisdell*, 290 U. S. 398. As stated in *Marshall v. Baltimore and Ohio Railroad Company*, 57 U. S. 314 (1853), p. 333: "It is an undoubted principle of the common law, that it will not lend its aid to enforce a contract to do an act . . . which is inconsistent with sound morals or public policy . . ."

Obviously, "The question whether an agreement is void on the ground that it is contrary to public policy is to be determined by its general tendency. If that is opposed to the interests of the public, the agreement is void, even though in the particular case the intent of the parties may have been good and no injury to the public may have resulted." (Citing cases.) *Sampliner v. Motion Picture Patents Co.*, 255 Fed. (C. C. A. 2nd, 1918) (p. 251); (Rev'd on other grds. 254 U. S. 233 (1925).)

We are concerned with the public policy of the present time, a public policy reflecting the political and economic needs and moral aspirations of the people of the United States; not the public policy of past generations. And it is uncontrovertible that the national public policy of the

United States today is unalterably opposed to any distinctions or discrimination based on race, color, creed or national origin. Expressions of this policy are contained not only in the international agreements to which this country is a signatory, such as the United Nations Charter, the treaty of Chapultepec, and the various treaties of cession with the Indians and others which we have adverted to previously (*supra*, pp. 4 *et seq*), but also in the decisions and opinions of this Court, in the provisions, language and general tenor of the Constitution of the United States, in the civil rights statutes and decisions, and in the views of the executive branch of the Federal government, as exemplified in part by its official statements and acts.

The Declaration of Independence, expressing public policy, states that "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator, with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." Among the basic purposes for which the Constitution of the United States was established was to "insure domestic tranquility * * * promote the general welfare, and secure the blessings of liberty * * *."[58]

The Ninth Amendment to the Constitution provides that "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." (1 Stat. 21).

And then, as stated in *Downes v. Bidwell*, 182 U. S. 244, "* * * there are certain principles of natural jus-

[58]The Constitution of the United States, preamble (1 Stat. 10).

tice inherent in the Anglo-Saxon character which need no expression in constitutions or statutes to give them effect."

Section 1977, Revised Statutes (8 U. S. C. 41), provides that "All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." And Section 1978, Revised Statutes (8 U. S. C., Sec. 42), provides that "all citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."

The President's committee on Civil Rights recommends that racial restrictive covenants be eliminated from our life. It says that "The effectiveness of restrictive covenants depends in the last analysis on court orders enforcing the private agreement. The power of the state is thus utilized to bolster discriminatory practices. The Committee believes that every effort must be made to prevent this abuse."[56a]

The existence of a national public policy in a field is not necessarily recognized only when Congress has acted on the subject. This Court has the duty, we believe, in the absence of legislative action, to enunciate public policy and to mold its decisions to present day standards and concepts, which may be enunciated by it in the first

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[56a] "To Secure These Rights," The Report of the President's Committee on Civil Rights, G. P. O. 1947, Recommendation V(4).

instance. *Hurtado v. California,* 110 U. S. 516, 530; *Funk v. United States,* 290 U. S. 371. "Discriminations based on race alone are obviously irrelevant and invidious," this court pointed out in *Steele v. Louisville,* 323 U. S. 192, 203. To the same effect, *Steele v. L. & N. R. R.,* 323 U. S. 292; *Smith v. Allwright,* 321 U. S. 648; *Nixon v. Condon,* 286 U. S. 73; *United States v. Classic,* 313 U. S. 315, and the other cases quoted in this brief.

These are all clear evidences of a national public policy opposed to practices of the type which have brought the instant cases before this court.

The harmful effect of occupancy restrictions upon the morale and health of restricted groups, including American Indians and their part-Indian descendants, also is determinative of public policy. This Court is fully acquainted, we are certain, with general conditions upon Indian reservations. Those persons of Indian descent who elect to leave or have left the reservations and attempt to assume the full status of citizens of the United States, are confronted with the dual burden of meeting general housing shortages and race restrictive clauses.

Non-restricted property, open alike to all individuals who are elsewhere denied the use and occupancy of premises upon racial grounds, is already so overcrowded as to constitute a national problem. That extremely grave situation will be adequately discussed, we are certain, by others appearing in these cases. But the problem of the American Indians in this connection is especially serious, however, since the inclusion of the American Indians among the non-Caucasian and other restrictees means, of course, that the Indians can only find occupancy in quarters open to such persons, thereby still further complicat-

ing the problems created by dangerous overcrowding of areas already occupied by those groups at present.

There are approximately 400,000 Amerindians[57] on this continent today. Divided into some 150 tribes, most of them reside on lands which they reserved for themselves, the reservations. More than 25,000 American Indians fought in World War II. One of them, a full-blood Pima, was among the six U. S. Marines who raised our flag on Iwo Jima.[58] Others performed numerous deeds of valor; many gave their lives. But their kin are denied full citizenship rights by being racially restricted in many respects by their fellow citizens.

Under the terms of the numerous restrictive covenants now prevalent in California, Indians and their descendants, regardless of the proportion of Indian blood in their veins, are barred from use or occupancy of restricted premises.

Not only has a very substantial part of all residential property been restricted on racial and religious grounds but such restrictions are on the increase.[60] (Myrdal, *An American Dilemma*, 624; Weaver, *Race Restrictive Housing Covenants*, Journal of Land and P. V. Economics,

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[57]A term distinguishing the natives of America who are descendants of pre-Columbian inhabitants of this continent, from the natives of India. *Willard Beatty*, Education for Action, *Haskell Institute.*

[58]"Indians in the War," United States Department of the Interior, Office of Indian Affairs, November, 1945.

[60]For example, officers of the Chambers of Commerce of San Fernando Valley, Los Angeles County, California, recently met to devise ways and means of further restricting on a racial basis unrestricted land in that area.

Vol. 20, No. 3, August, 1944; National Urban League, New York, *Racial Problems in Housing.*)[61]

In California, the situs of this *amicus curiae,* the situation of the Indians and persons of Indian descent with respect to land occupancy is especially intolerable. Although Congress in 1850, provided for negotiation with the Indians concerning the land they held,[62] eighteen treaties subsequently made with the Indians were never ratified by the United States Senate,[62a] partly as a result of adverse pressure by members of the Legislature of California.[63] As a result, the California Indians surrendered their properties comprising much of California—75,000,000 acres of land. They were never allocated the land

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[61]Even the court in *Plessy v. Ferguson,* 163 U. S. 537, could not foresee the possibility, urged there by counsel, that separation might be required or permitted in the future of people "who belong to certain nationalities"; such a possibility was ruled out by the Court with the opinion that it would be unreasonable, and that no action would be countenanced which was "for the anoyance or oppression of a particular class" (163 U. S. at pp. 549-550). Yet today restrictions are in effect against practically every racial minority, almost all people whose national origin is not European, and some religious groups.

[62]Act of September 30, 1850, 9 Stat. 544, 558.

[62a]See Congr. Record (July 8, 1852).

[63]See California Senate Journal for February 11, 1852, pp. 105-106, and for February 16, 1852, pp. 202-205; Assembly Journal for March 22, 1852, pp. 396-397.

promised to them, nor were they properly resettled elsewhere.[64]

The injustice of this situation ultimately resulted in the enactment of the Jurisdictional Act of 1928 (45 Stat. 602, amended 46 Stat. 259).[65]

But it provides no relief for the descendants of Indians who wish to live off the reservation; they are restricted because of their race.

It is thus manifest, we submit, that wherever we have a restrictive covenant based on racial considerations, we are plainly dealing with "an agreement made contrary to the public policy * * * in contravention of * * * treaties, and in violation of a principle embodied in its Constitution. Such a contract is absolutely void, and should not be enforced in any court * * *"[66]

Plainly a restriction based on racial or religious considerations is today void as being against national public policy, and should be so declared by this Court.

No greater impetus, we submit, toward elimination of totalitarian concepts can be found than the outlawing

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[64]See Transcript of Record, Sup. Ct. of United States, October Term, 1942, No. 866. Ultimately reservations totalling 611,226 acres of isolated wastelands, including desert, mountain, and grazing lands, were allocated. See Hearings before a Subcommittee of the Committee on Indian Affairs, House of Representatives, 66th Congress, 2nd Session, March 23, 1920, pp. 98-139; Report of the Secretary of the Interior to the Attorney General of the United States, June 1, 1934, pp. 26-29.

[65]"The history of the Mission Indians for a century may be written in four words; conversion, civilization, neglect, outrage." Sen. Rept. No. 74, 50th Cong., 1st Sess., quoted in *United States v. Arenas*, 158 F. (2d) 730, 733.

[66]*Gandolfo v. Hartman*, 49 Fed. 181, 192, 193.

of practices which tend to weaken our Nation by pitting group against group, and person against person upon racial or religious grounds. Our democratic principles demand equality of treatment for all the peoples, races and religions, the protection of all basic rights, and the fullfillment of all fundamental needs. And what we seek here is not an innovation in our basic way of life, but the continuation of the American ideal, of the public policy which does not recognize distinctions based on race, color, creed or national origin.

Conclusion.

This entire Continent was once the property of the American Indian. Occupancy and use was unrestricted, and both the aboriginal owners and the European immigrants who began arriving in 1620, found ample room to breathe freely, to follow their conscience, and to live. As Red Jacket, a Seneka Indian, aptly described the situation which later developed: "The white people came here and asked us for a small space to spread their blankets. We gave them that space. Then they asked for a larger space to spread their blankets, and we gave them that space, and they continually asked us for a larger and a larger and still a larger space until there is no longer any room for us." (*United States v. Arenas,* 158 F. (2d) 730, 743.)

Solemn treaties, concluded between the governments of the colonists and the independent Indian nations and tribes, contemplated that the American Indians should always be permitted to remain as occupants of the Continent which was originally theirs. Today the vicious, un-American practices of a small minority against not only the American Indian but also other groups, are rapidly

reducing the undertakings of our government, and constitutional and fundamental guarantees to a nullity. "* * * A decent respect to the opinions of mankind * * *"[67] if nothing else does, demands the elimination of all racial and religious restrictions in this country at the earliest possible date, and the elimination of racial and religious restrictive covenants now. As the direct descendants of the aboriginal owners of this land, and as citizens of the United States, we respectfully urge this Court to hold unconstitutional that restrictive covenant system.

Respectfully submitted,

AMERICAN INDIAN CITIZENS LEAGUE OF CALIFORNIA, INC.,

Amicus Curiae.

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November 18, 1947.

[67]The Declaration of Independence, July 4, 1776 (1 Stat. 1).